

16 SEPTEMBER 1958

OGC Has Reviewed

MEMORANDUM FOR THE RECORD

SUBJECT: Court-Martial Jurisdiction Over Civilian Employees of the
Military Forces

1. On September 12, 1958, in the case of United States of America, ex rel Dominic Guagliardo v. Neil H. McElroy, et al., the United States Court of Appeals for the District of Columbia Circuit reversed a District Court decision which denied a writ of habeas corpus to a civilian convicted by a court-martial. The court in a 2-1 opinion written by Judge Fahy determined that the decision of the Supreme Court in Meid v. Covert governed this case and that Article 2 (11) of the Uniform Code of Military Justice was non-severable.

2. Guagliardo was a Civil Service employee of the Air Force who worked at an Air Force depot near Casablanca. He lived with his wife off the depot and was entitled to quarters allowance, mail and other privileges. He and two enlisted men were charged with stealing Government materiel, was tried by court-martial, convicted and sentenced. He applied for a writ of habeas corpus but this was denied by the District Court for the District of Columbia on 13 January 1958 (158 F. Supp. 171). The appeal followed.

3. The Government defended its court-martial jurisdiction solely on reason of Article 2 of the Uniform Code which enumerates the persons to whom the Code applies. Subparagraph 11 of Article 2 is pertinent to this case:

"Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States"

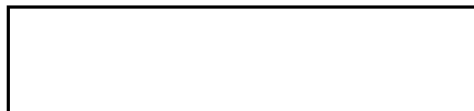
The appellant contended that this provision was unconstitutional as to a civilian employee in peacetime. The Government attempted to show that Article 1, Section 8, Clause 14 which empowers Congress to "make rules for the Government and Regulations of the land and naval Forces" together with the Necessary and Proper Clause enables Congress to establish court-martial jurisdiction over those persons specified under Article 2 (11) of the Uniform Code.

4. In Reid v. Covert, four Justices would not permit an exception to "the land and naval Forces" to include civilians and two Justices would not permit such an exception when it involved a civilian wife charged with a capital offense. The same conclusion applies to Guagliardo because provisions of Article 3, Section 2 and the Fifth and Sixth Amendments of the Constitution were not complied with, according to the court. The majority of the court reasoned that because Mrs. Covert or an employee such as the appellant could not be tried by court-martial on a capital charge, then the "existing congressional plan for extending court-martial jurisdiction to persons accompanying or employed by the armed forces outside the United States" exceeds constitutional bounds. The Code does not provide for exceptions and the court here decided that it could not rewrite provisions of the Code along narrower lines and decide their validity in each individual case.

5. According to the opinion, the severability clause in the Code does not allow the court to divide subparagraph 11. The majority concluded its opinion by stating that "there is a complete absence of any regular standard for the inclusion of appellant other than a standard that includes all civilian employees with the forces abroad and that standard is so extensive as to be invalid as a basis for denial to civilians tried by the United States in time of peace of the protection of Article 3, Section 2 of the Code and of the Fifth and Sixth Amendments."

6. Judge Burger filed a dissent pointing out that "there is no other feasible means of law enforcement available at a foreign military base for crimes against the United States." He does not believe that Reid v. Covert can be applied to employees and also that Article 2 (11) of the Code was not struck down in its entirety by that case. By historical precedent, he suggests that employees "serving with" the armed forces come within court-martial jurisdiction. He states "in the absence of a feasible substitute, Clause 14 together with the Necessary and Proper Clause seems to me to empower Congress to subject these employees to trial by court martial." (Winthrop's Military Law and Precedents cited by Judge Burger in his dissent was obtained recently by OGC and is available in the OGC Library.)

7. I have been informed that the Government is now considering two courses of action regarding further moves in this case: (1) having an appeal by the United States Attorney's Office, heard by the Court of Appeals en banc, or (2) taking the case to the Supreme Court.



STATINTL

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